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February 21, 2013

Honorable Roderick D. Wright  
Room 2032, State Capitol

LOS ANGELES MEMORIAL COLISEUM COMMISSION - #1302520

Dear Senator Wright:

You have asked us two questions regarding agreements related to the management of the Los Angeles Memorial Coliseum and to the parking facilities in Exposition Park. The details of those agreements, your questions related to those agreements, and our analysis of the issues presented by your questions are set out below.

The Los Angeles Memorial Coliseum Commission (hereafter the commission) is a joint powers authority created by an agreement made pursuant to the Joint Exercise of Powers Act.<sup>1</sup> The member agencies forming the commission are the City of Los Angeles, the County of Los Angeles, and the Sixth District Agricultural Association, also known as the California Science Center.<sup>2</sup> By virtue of the joint powers agreement among these three entities, the commission is authorized to operate and manage certain facilities in Exposition Park, including the Los Angeles Memorial Coliseum (hereafter the coliseum).

You have informed us of the following facts. In 2008, the commission and the University of Southern California<sup>3</sup> entered into a lease agreement (hereafter the USC lease) that authorized the University of Southern California to use the coliseum at specified dates and times for events in exchange for various payments.<sup>4</sup> In that agreement, the commission agreed to act as the landlord for the University of Southern California, and, in that capacity,

<sup>1</sup> Gov. Code, § 6500 et seq.; § 6500.1.

<sup>2</sup> See Gov. Code, § 8300.

<sup>3</sup> The University of Southern California is a private institution of higher learning. (<http://about.usc.edu/> [as of Feb. 19, 2013].)

<sup>4</sup> Lease and Agreement by and between Los Angeles Memorial Coliseum Commission and University of Southern California (May 14, 2008), § 2, pp. 4-12, § 4, pp. 13-17.

agreed to carry out necessary repairs and certain capital improvements according to a specified schedule.<sup>5</sup>

We have been informed by you that the commission has not completed those capital improvements in accordance with the schedule set out in the USC lease. We have also been informed by you that the commission is currently in financial difficulties and may fail to meet payroll obligations by March 2013. Presumably in response to concerns that the commission's interest in the coliseum may terminate, the California Science Center entered into a non-disturbance agreement with the University of Southern California in 2012.<sup>6</sup> Under that agreement, the California Science Center agreed that, if the commission's interest were to terminate, the California Science Center would assume the rights and responsibilities of the commission under the USC lease, including the responsibility to perform the capital improvements.<sup>7</sup> You have informed us that the cost of those improvements is approximately \$70 million.

Recently, the University of Southern California and the California Science Center negotiated a tentative agreement providing that, if the commission's interest in the coliseum were to terminate, the University of Southern California would assume the obligation to construct the capital improvements.<sup>8</sup> This tentative agreement also contemplates an agreement between the University of Southern California and the California Science Center whereby the University of Southern California would manage certain parking lots owned by

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<sup>5</sup> *Id.* at § 9, pp. 31-33 & § 13, pp. 44-57.

<sup>6</sup> Non-disturbance agreement between the California Science Center, the University of Southern California, and the Los Angeles Memorial Coliseum (hereafter the non-disturbance agreement). The copy of the agreement we were provided with does not state when the agreement was signed. The non-disturbance agreement states, at page 2, that it will become effective only if "the interest of Commission is terminated by [the California Science] Center or by operation of law prior to the expiration or termination of the lease." We have not been provided with any specific example of how the commission's interest in the coliseum may terminate. That interest may terminate in a variety of ways, including a vote of the members of the commission to terminate the joint powers authority, or bankruptcy of the entity. (See Gov. Code, § 6510.)

<sup>7</sup> *Ibid.*

<sup>8</sup> Anna M. Caballero, Secretary of State and Consumer Services, letter to Robert Stein, Chair, Board of Directors, California Science Center, Dec. 17, 2012, available at <[http://www.scsa.ca.gov/ExpoPark/cover\\_letter.pdf](http://www.scsa.ca.gov/ExpoPark/cover_letter.pdf)> (as of Feb. 19, 2013); Proposed Lease Negotiations between the State and the University of Southern California, available at <<http://www.scsa.ca.gov/ExpoPark/index.shtml>> (as of Feb. 19, 2013).

the California Science Center, and would have rights to a portion of the revenue earned from those parking lots.<sup>9</sup>

**1. Is the non-disturbance agreement entered into between the California Science Center and the University of Southern California valid?**

In order to address whether the non-disturbance agreement entered into between the California Science Center and the University of Southern California is valid, it is necessary to examine the statutory powers of the California Science Center and whether the agreement constitutes a gift of public funds in violation of article XVI, section 6 of the California Constitution.

**1.1 Statutory authority of the California Science Center to enter into the non-disturbance agreement**

The California Science Center, otherwise known as the Sixth District Agricultural Association, is a state agency.<sup>10</sup> A state agency may not exercise any power that is not expressly or impliedly granted to it by statute or the California Constitution.<sup>11</sup> In that regard, a district agricultural association, such as the California Science Center, has the authority to contract in general, to use and manage its property, and to lease any personal or real property owned by that agency or owned jointly by that agency and another entity.<sup>12</sup>

Pursuant to that authority, the California Science Center may enter into a lease to manage any real property that is owned by it or owned jointly by that agency and another entity. The JPA agreement that we were provided with states that obligations of the commission are not the obligations of the constituent members of the commission.<sup>13</sup> Notwithstanding the JPA agreement, the non-disturbance agreement obligates the California Science Center to assume the commission's responsibilities as a landlord under the USC lease. In effect, pursuant to the non-disturbance agreement, the California Science Center has agreed to enter into a new lease with the University of Southern California that begins on the date that the commission's interest in the coliseum is terminated. The City of Los

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<sup>9</sup> Term Sheet, California Science Center Master Parking Lease, available at <[http://www.scsa.ca.gov/ExpoPark/pkglots\\_1\\_6\\_term\\_sheet.pdf](http://www.scsa.ca.gov/ExpoPark/pkglots_1_6_term_sheet.pdf)> (as of Feb. 19, 2013).

<sup>10</sup> See Gov. Code, § 11000, defining "state agency."

<sup>11</sup> See, e.g., *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042.

<sup>12</sup> Food & Agr. Code, § 4051.

<sup>13</sup> Amended and Restated Los Angeles Memorial Coliseum Commission Management Agreement, November 9, 1976, page 4 (hereafter JPA agreement). Government Code section 6508.1 provides that all constituent members of a joint powers agency are liable for the debts, liabilities, and obligations of the agency, but allows the joint powers agreement to specify otherwise.

Angeles and the County of Los Angeles, the two other constituent entities forming the commission, did not agree to the non-disturbance agreement. Therefore, in order for the non-disturbance agreement to be valid, the California Science Center must have a sufficient property interest in the coliseum on its own on the date that the commission's interest in the coliseum terminates to be able to lease the coliseum to the University of Southern California.

In that respect, the JPA agreement states that all parties to the agreement are given an equal interest in the coliseum for the duration of the agreement.<sup>14</sup> If the commission were to expire or be terminated, then the constituent members of the commission will succeed to their proportional rights in the coliseum.<sup>15</sup> Although we lack the information necessary to independently determine the precise nature of its interest in the coliseum building, you have informed us that the California Science Center owns the coliseum building in its entirety. Based upon that ownership interest, the California Science Center would have had the statutory authority, in our view, to enter into the non-disturbance agreement.

## 1.2 Constitutional prohibition on the gift of public funds

Although we conclude that the California Science Center had the statutory authority to enter into the non-disturbance agreement, it is necessary to determine whether the exercise of that authority was unconstitutional as a gift of public funds under article XVI, section 6 of the California Constitution. That provision prohibits the state from using public funds to benefit a private individual or corporation without receiving consideration for that expenditure.<sup>16</sup> The consideration received need only be adequate,<sup>17</sup> but cannot be nominal.<sup>18</sup> Adequacy, in this context, does not require the state to receive fair market value; instead, a court looks only to whether the consideration was plainly substantial.<sup>19</sup>

Under the non-disturbance agreement, if the commission's interest in the coliseum were to terminate, the California Science Center would succeed to all the rights and obligations of the commission under the USC lease. In that instance, the California Science Center would succeed to the commission's right to receive rental payments from the University of Southern California. According to the USC lease, for every sports event,<sup>20</sup> the

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<sup>14</sup> *Id.* at pp. 5-6.

<sup>15</sup> *Id.* at p. 13.

<sup>16</sup> See, e.g., *Allied Architects' Ass'n of Los Angeles v. Payne* (1923) 192 Cal. 431, 438-439.

<sup>17</sup> *Winkelman v. City of Tiburon* (1973) 32 Cal.App.3d 834, 845 (hereafter *Winkelman*).

<sup>18</sup> See, e.g., *Allen v. Hussey* (1950) 101 Cal.App.2d 457, 473 (hereafter *Hussey*) (long-term lease of airport to a private company for \$1 dollar a year was an unconstitutional gift of public funds). Consideration is not limited to monetary consideration, but may also be found if the transaction had a public purpose. (*Los Angeles County v. La Fuente* (1942) 20 Cal.2d 870, 877.)

<sup>19</sup> *Winkelman, supra*, 32 Cal.App.3d at p. 845; *Hussey, supra*, 101 Cal.App.2d at p. 473.

<sup>20</sup> The University of Southern California must pay different rental amounts for non-sports events. (USC lease, *supra*, § 4.2, pp. 15-16.)

University of Southern California must pay to the commission rent in the form of 8 percent of ticket sales per event, 8 percent of revenues earned from live broadcast of the event, and a specified portion of the expenses to conduct the event.<sup>21</sup> Under these terms, we do not believe that the consideration received would be merely nominal.<sup>22</sup> Because we think that the California Science Center would receive adequate consideration from the University of Southern California in the form of rental payments in exchange for its promise to perform the capital improvements, it is our view that the non-disturbance agreement is not unconstitutional as a gift of public funds.

Thus, it is our opinion, based on the facts above, that the non-disturbance agreement entered into between the California Science Center and the University of Southern California is valid.

**2. May the California Science Center delegate to the University of Southern California the duty to manage or operate certain parking facilities at Exposition Park?**

The California Science Center may not exercise any power that is not expressly or impliedly granted to it by statute or the California Constitution.<sup>23</sup> A state agency is required

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<sup>21</sup> USC lease, *supra*, at § 4, pp. 13-15.

<sup>22</sup> According to the Internet Web site of the Secretary of State and Consumer Services, the California Science Center has proposed to amend the non-disturbance agreement and the USC lease. (Draft of non-disturbance agreement and direct lease by and between the California Science Center and the University of Southern California, available at <[http://www.scsa.ca.gov/ExpoPark/non\\_disturbance\\_agree\\_lease.pdf](http://www.scsa.ca.gov/ExpoPark/non_disturbance_agree_lease.pdf)> [as of Feb. 19, 2013].) Under that proposed non-disturbance agreement and lease, the University of Southern California would be responsible for maintaining the coliseum and performing the capital improvements. (*Id.* at §§ 10 & 11, pp. 21-24.) In return, the University of Southern California would pay the California Science Center a base rent that is equal to the amount the commission had previously paid to the California Science Center for use of the coliseum, an amount to fund the California Science Center's ongoing operations, and the California Science Center's share of the cumulative calculated amount that is determined according to a specified formula based, in part, on the amount of operating receipts received for coliseum events. (*Id.* at § 4, pp. 7-10, glossary, and sched. 4.3(d).) According to that document, it is possible that there may be years in which the California Science Center's share of the cumulative calculated amount is zero. Because we lack information regarding the expected operating receipts from events held by the University of Southern California at the coliseum, we cannot determine if the amount payable to the California Science Center under this proposed non-disturbance agreement and lease would be adequate consideration for purposes of the constitutional prohibition on gifts of public funds.

<sup>23</sup> See, e.g., *People v. Maikhio* (2011) 51 Cal.4th 1074, 1088; *County of Santa Clara v. Deputy Sheriffs' Assn.* (1992) 3 Cal.4th 873, 882 (state agency may exercise those additional powers that may be "fairly implied from the statute to accomplish the task expressly granted").

to exercise any power granted to it in accordance with the mode or manner prescribed by statute.<sup>24</sup> Accordingly, if a state agency is granted a power that requires the exercise of discretion, that power is in the nature of a public trust and may not be exercised by others without statutory authorization.<sup>25</sup>

In this instance, the Legislature required the California Science Center to "manage or operate its parking facilities in a manner that preserves and protects the interests of itself and the California African-American Museum and recognizes the cultural and educational character of Exposition Park."<sup>26</sup> This provision was originally enacted in response to the claim that events at the coliseum were making it difficult for the California Science Center and other entities to operate because those events were taking up all the parking space at Exposition Park.<sup>27</sup> To remedy that problem, the Legislature imposed this statutory duty on the California Science Center regarding the parking resources at the park.<sup>28</sup>

The statutory framework governing the operation of the parking lots indicates that the Legislature has shown special concern over whether those lots are managed for the benefit of the park.<sup>29</sup> In addition to the statutory provisions discussed above, the Legislature has restricted the use of the revenue earned from the operation of the parking lots in Exposition Park by requiring that all revenues be deposited into the Exposition Park Improvement Fund and be used, upon appropriation by the Legislature, for various improvements to Exposition Park.<sup>30</sup> Read together, these provisions demonstrate a legislative concern that management of the parking lots be conducted in a way that focuses on the park's improvement and the development of its cultural resources. Given that concern, and the wording of the statute quoted above, we think that the California Science Center is statutorily required to exercise its discretion in determining how best to accomplish these ends. Because of this need for discretion in managing the parking lots, and because the Legislature has not authorized the California Science Center to delegate this function, we conclude that the duty to manage the parking lots is in the nature of a public trust and may not be delegated to a private entity.

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<sup>24</sup> *U.S. v. Jones* (9th Cir. 1949) 176 F.2d 278, 281; see also *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086 (scope of authority limited by governing statute).

<sup>25</sup> See, e.g., *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24-25 (city council may not delegate its duty to fix compensation of certain employees to arbitrator); see also *Stevens v. Geduldig* (1986) 42 Cal.3d 24, 49, fn. 9 (power to expend public funds involves discretion).

<sup>26</sup> Food & Agr. Code, § 4106, emphasis added.

<sup>27</sup> Sen. Governmental Organization Com., analysis of Assem. Bill. No. 2990 (1987-1988 Reg. Sess.) as amended June 9, 1988.

<sup>28</sup> *Ibid.*

<sup>29</sup> Food & Agr. Code, §§ 4105 & 4106; see, e.g., *Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1107 (statute should be interpreted consistent with the statutory framework of which it is a part).

<sup>30</sup> Food & Agr. Code, § 4106, subd. (c).

In addition, by placing functions currently exercised by the state in the hands of a private entity, the proposed agreement may violate the civil service requirements of the California Constitution. Article VII, section 1 of the California Constitution requires that officers and employees of the state, except as otherwise provided for in the Constitution, be appointed through the civil service system based on merit and a competitive examination. Cases interpreting that provision have held that it impliedly prohibits the state from "contracting for private companies to perform the kind of services that persons selected through the civil service system could perform adequately and competently."<sup>31</sup> Government Code section 19130 authorizes the state to enter into personal services contracts under certain circumstances, including when the services "cannot be performed satisfactorily by civil service employees, or are of such a highly specialized or technical nature that the necessary expert knowledge, experience, and ability are not available through the civil service system."<sup>32</sup>

Again, the California Science Center is statutorily required to operate the parking facilities.<sup>33</sup> All public employees, including employees of the California Science Center, are presumed to be a part of the civil service system, except for some limited exceptions which would not apply here.<sup>34</sup> An exception in this case would require a showing, notwithstanding the current management of the parking facilities by the California Science Center, that the operation of the parking facilities requires skills that are unique or otherwise highly specialized such that persons selected through the civil service system could not perform those duties adequately and competently.<sup>35</sup> Absent that showing, we conclude that the proposed agreement, in which the California Science Center would contract with the University of Southern California to operate the parking facilities, would be unconstitutional under article VII, section 1 of the California Constitution.

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<sup>31</sup> *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 547; see also *California Correctional Peace Officers' Ass'n v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 821 (hereafter Schwarzenegger). But the state and all other governmental entities are expressly authorized to contract with qualified private entities for architectural and engineering services. (Cal. Const., art. XXII.)

<sup>32</sup> Gov. Code, § 19130, subd. (b)(3).

<sup>33</sup> Food & Agr. Code, § 4106.

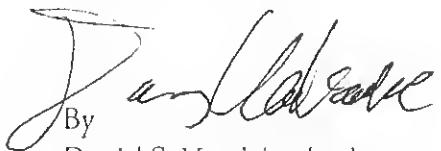
<sup>34</sup> Cal. Const., art. VII, §§ 1 & 4.

<sup>35</sup> See Schwarzenegger, *supra*, 163 Cal.App.4th at pp. 820-825 (the state did not violate article VII when it contracted with private organizations to run prisons because there were inadequate public facilities to address the urgent need to accommodate prison overcrowding); see also Gov. Code, § 19130.

Therefore, it is our opinion that the California Science Center may not delegate to the University of Southern California the duty to manage or operate certain parking facilities at Exposition Park.

Very truly yours,

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